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May 19, 2004

VIA ELECTRONIC FILING

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TWB-204
Washington, DC 20554

Re: Ex parte, *BellSouth Request for Declaratory Ruling that State Commission May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband Service to CLEC UNE Voice Customers*, WC Docket No. 03-251

Dear Ms. Dortch,

On Tuesday, May 18, 2004, Robert Quinn and the undersigned, AT&T, and David Lawson, Sidley Austin Brown & Wood, representing AT&T, met with William Maher, Jeffery Carlisle, Robert Tanner, Thomas Navin and Ian Dillner of the Commission's Wireline Competition Bureau. The purpose of the meeting was to discuss AT&T's opposition to BellSouth's request for a declaratory ruling in the above-captioned proceeding. I have attached an outline summarizing AT&T's arguments as presented during our meeting.

In addition, at one point during the meeting staff inquired about the status of the case pending before the United States Court of Appeals for the Eleventh Circuit dealing with issues raised in this proceeding. AT&T indicated that it had filed, together with CompTel/ASCENT Alliance, as *amici curiae* in that case and provided staff with a copy of our brief. I have attached a copy of our brief to this Notice.

Sincerely,

ATTACHMENTS

cc: W. Maher
J. Carlisle
R. Tanner
T. Navin
I. Dillner

AT&T

BellSouth's Anticompetitive Marketing Practices

- "[T]he Commission finds that BellSouth's policy is anticompetitive in violation of [state law]. In sum, BellSouth uses the tying arrangement to insulate its voice service from competition by impairing the customer's ability to choose its provider of local service. . . . This Commission is not telling BellSouth that it cannot sell its DSL service. Nor is this Commission telling BellSouth that it cannot be compensated for selling its DSL service. It is not even telling BellSouth what price to offer for its DSL service. All the Commission is telling BellSouth is not to refuse customers an option separate from voice service in an effort to preserve its monopoly share of the voice market from the effects of competition. Any implication that as a result of this order BellSouth would be discouraged from investing in innovative technology in the future appears wholly inconsistent with the record in this docket. The record reflects that BellSouth has an overwhelming majority of the DSL lines in Georgia and that DSL, despite a relatively late start, has overtaken cable modems in Georgia." **Georgia PSC October 21, 2003 Order**.

- "[T]he alternatives to BellSouth's DSL service [resale, cable modems, CLEC DSL and line splitting] do not substantially diminish the anticompetitive impact of BellSouth's policy on local voice competition." **Georgia PSC October 21, 2003 Order**.

- "BellSouth's practice of disconnecting customers from BellSouth DSL service when the customers switched to CLEC voice services raises a competitive barrier in the voice market." **Florida PSC June 5, 2002 Order**.

- "BellSouth's practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers." **Kentucky PSC July 12, 2002 Order**.

- The "anti-competitive affects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited." **Louisiana PSC January 24, 2003 Order**.

- The Kentucky PSC's decision will "ameliorate a chilling effect on competition for local telecommunications" without "substantially prevent[ing] implementation of federal statutory requirements." **U. S. District Court for the Eastern District of Kentucky 2003**.

The Triennial Review Order provides no basis to preempt the state PSCs' Orders

The State PSC Orders do not violate any of the Commission's TRO holdings:

- The Commission held that ILECs must unbundle stand-alone copper loops but that they have no section 251(c)(3) obligation separately to unbundle the low-frequency or high-frequency portion of a loop.

- None of the state commission determinations BellSouth challenges required it separately to unbundle the low-frequency or high-frequency portion of any loop. Rather, consistent with the TRO, CLECs in each of the states remain obligated to secure and pay for the *entire* loop.

- The TRO did not purport to authorize ILECs to turn off (or refuse to provide) DSL service to customers that switch to another local telephone provider. The Commission said nothing about the reasonableness or lawfulness of that practice, much less the propriety of restrictions on the practices imposed by sovereign states, in the exercise of core police powers expressly preserved by the Communications Act.

- BellSouth's claim that the Commission can nonetheless label the state PSC orders "unbundling" requirements to establish a direct conflict with federal law is foreclosed by the Commission's own established definition of unbundling. *See* AT&T v. Iowa Utilities Bd., 525 U.S. at 394 ("The dictionary definition of 'ubundle[d] . . . matches the FCC's interpretation of the word: 'to give *separate prices* for equipment and supporting services').

- Moreover, what the State PSCs have ordered is not, in practice, remotely the same as a requirement of "HFPL/LFPL" sub-loop unbundling: under the State PSC orders, the CLEC pays the full price of the entire loop and has the opportunity to displace the BellSouth DSL service with its own service much more directly.

- The Commission's ¶ 269 limitations on its transitional "grandfathering" of existing HFPL arrangements have no possible relevance to the State PSC Orders.

AT&T

The Triennial Review Order provides no basis to preempt the state PSCs' Orders

Because there is no direct conflict with the TRO, BellSouth must argue that the State PSC's Orders somehow conflict with "policies" underlying the TRO HFPL/LFPL unbundling holdings.

- To justify preemption BellSouth must show that, unless preempted, the State PSC Orders would "negate" a specific federal policy. Mere "inconsistency" is not enough. *See, e.g., NARUC* v. *FCC*, 880 F.2d at 428-29; TRO ¶ 192 n. 611 (state regulation "must 'substantially prevent' the implementation of the federal regime to be precluded").

- The LFPL portion of the TRO (¶ 270) upon which BellSouth relies identifies no federal policy underlying the Commission's holding that ILECs are not required under § 251(c)(3) separately to unbundle the low frequency portion of the loop.

- Rather, ¶ 270 purports to make a straightforward impairment determination based on the factual assumption that it will generally be possible for CLECs to make line-splitting arrangements. Moreover, the State PSCs, have found that, at least in their States, such arrangement are *not* widely available. Indeed, as AT&T has explained, Covad serves fewer than 14 percent of the central offices in BellSouth's territory.

- The HFPL portion of the TRO (¶ 260) does note a federal policy in ensuring that HFPL pricing does not provide "irrational cost advantage[s]," but the State PSC Orders, which require the CLEC to pay for the entire loop and thus provide the CLEC with every incentive to full use of that loop and gain (or share in) the DSL revenue stream where that is possible, plainly have do not conflict with – must less negate – that federal policy.

- The State PSC Orders, which allow BellSouth to collect the full retail DSL charge set by BellSouth, have no possible impact on BellSouth's DSL investment incentives.

- It would be patently arbitrary for the Commission to preempt State PSC Orders directed at promoting local voice competition on some attenuated (indeed, false) notion that those orders somehow undermine federal broadband policy while ignoring altogether that the orders directly *promote* established federal narrowband policies.

No Federal Policy Is Being Negated

- BellSouth's wholesale and retail DSL services are jurisdictionally mixed services, not, as BellSouth claims, purely interstate services.

- Contrary to BellSouth's suggestion, the Commission's jurisdiction over jurisdictionally mixed services is not *exclusive* jurisdiction. Rather, as the Courts have repeatedly cautioned, the Commission may preempt state regulation of jurisdictionally mixed services only to the extent that enforcement of the state regulation in question would negate a specific federal policy.

- "The FCC has the burden . . . of showing with some specificity that [state regulation] . . . would negate the federal policy." *NARUC* v. *FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989).

- Thus, under any theory, BellSouth's argument must fail because BellSouth cannot show with specificity how these State PSC Orders would negate any federal policy -- these are *not* the facts upon which the Commission wants to litigate a broad preemption theory.

- The *GTE ADSL* order held is inapposite. That order held only that federal tariffing of DSL services that include both interstate and intrastate communications is permissible under the "10 percent" rule, a cost separations rule that determines whether costs of mixed use facilities will be recovered through interstate or intrastate rates. That ruling, like all federal law rulings, had some preemptive effect – but *only* with respect to state requirements that actually conflict with the federal tariff.

- The Commission expressly *declined* to address arguments that it should more broadly pre-empt state regulation of federally-tarrifed DSL services and expressly recognized that to justify any such preemption on "inseverability" grounds it would "bear[] the burden of demonstrating that state regulation 'negates the exercise by the FCC of its own lawful authority over interstate communications.'" *See Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 114 (D.C. Cir. 1989) ("Whether or not the mixed character of these services permits the FCC to assign some portion of their . . . costs to the interstate jurisdiction for recovery through interstate tariffs is a separate question" from preemption of state regulation.

There is no conflict between the BellSouth tariff's terms and the state commission orders

- BellSouth relies upon Section 28.2.1 of its FCC No. 1 Access Tariff, entitled "BellSouth ADSL Service, General," which states: "The designated end-user premises location must be served by an existing, in-service, Telephone Company provided exchange line facility."
- AT&T UNE-P voice customers in BellSouth's region *are* "served by an existing, in-service, Telephone Company provided exchange line facility."
- Any ambiguity -- particularly, ambiguity in a provision claimed by a common carrier to entitle it both to deny service to disfavored customers and to preempt state law -- must be construed against BellSouth.
- BellSouth's claim that Section 28.2.1 unambiguously entitles it to deny service to any customer that maintains its existing, in-service BellSouth exchange line facility, but chooses to obtain voice service over that facility from another carrier is particularly untenable in light of BellSouth's January 8, 2004 tariff revision.
- On January 8, 2004 BellSouth revised its tariff to add a new, specialized "Session Based DSL Service," and the new provisions relating to that service (Section 28.3.1) contain both the original requirement that "[t]he designated end-user premises location must be served by an existing, in-service Telephone Company provided exchange line facility" ***AND*** an additional requirement that the "in-service exchange line facility, as referred to in connection with BellSouth Session Based DSL service, *must be provided in connection with a BellSouth retail local exchange service*."
- If BellSouth wants to impose that *new* condition on its DSL offerings more generally, it must propose revisions to its tariff to do so, and, if BellSouth does so, the Commission should -- before it relies upon any such new condition broadly to preempt state law -- determine that it is just and reasonable.